Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1217

LAWRENCE A. UZZELL and
ROBERT LANE ARRINGTON,
Individually, and upon behalf
of all other similarly situated, et al.,
*Petitioners*,

*v.*

WILLIAM C. FRIDAY, Individually,
and as President of the University of
North Carolina, et al.,
*Respondents*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

NO.

LAWRENCE A. UZZELL and
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Individually, and upon behalf
of all other similarly situated, et al.,
*Petitioners*,

*v.*

WILLIAM C. FRIDAY, Individually,
and as President of the University of
North Carolina, et al.,
*Respondents*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To: The Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

The Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 9, 1979.

## OPINIONS BELOW

The judgment of the Court of Appeals for the Fourth Circuit entitled "Order" entered on November 9, 1979, is not reported and is printed as Appendix B to this Petition. The opinion of the Court of Appeals for the Fourth Circuit Upon Remand entered on February 2, 1979, is reported at 591 F.2d 997. The Order of the United States Supreme Court, granting certiorari, vacating judgment, and remanding for further proceedings in light of the decision in the *Board of Regents of the University of California v. Bakke*, is reported at 438 U.S. 912, 57 L.Ed. 2d 1158, 98 S.Ct. 3139. The opinion of the Court of Appeals for the Fourth Circuit on Petition of Appellees for a Rehearing en banc entered on July 28, 1977, is reported at 558 F.2d 727. The opinion of the panel of the Court of Appeals for the Fourth Circuit is reported at 547 F.2d 801. The opinion of the District Court for the Middle District of North Carolina is reported at 401 F.Supp. 775. The Petitioners do not seek review of judgments delivered in connection with these opinions, and the same are therefore not appended to this Petition.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. WHETHER CONGRESS HAS DEPRIVED A SENIOR JUDGE OF THE COURT OF APPEALS OF POWER RETAINED BY HIM UPON HIS RETIREMENT TO SIT *EN BANC* UPON CASES THERETOFORE HEARD ON A-PANEL.



Pursuant to Rule 33(b) of the Rules of the United States Supreme Court, the Petitioner hereby recites that Section 2403(a) of Title 28 of the United States Code may be applicable.

2. WHETHER THE RECALL OF MANDATE AFTER NINE MONTHS AND AFTER THE APPOINTMENT OF TWO NEW JUDGES DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 3, Section 1 of the Constitution of the United States provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Section 5 of Public Law 95-486, 95th Cong. October 20, 1978, 92 Stat. 1629, provides:

> "Section 5. (a) Section 46 (c) of Title 28 of the United States Code is amended—
>
> (1) in the first sentence, by striking out 'division' and inserting 'panel' in lieu thereof; and
>
> (2) by striking out the third sentence."

* * * *

28 U.S.C. 46(c), before October 20, 1978, provided:

> "(c) Cases and controversies shall be heard and determined by a Court or division of not more than three judges, unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court *en banc* shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court *en banc* in the rehearing of a case or controversy if he sat in the court of division at the original hearing thereof."

## STATEMENT OF THE CASE

On June 15, 1974, this action was commenced in the United States District Court for the Middle District of North Carolina seeking to nullify certain University practices as being racially discriminatory and in violation of the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U.S.C. 1983, and the Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d. Thereafter, the District Court granted the Respondents' motion for summary judgment. 401 F. Supp. 775.

The Petitioners appealed. On January 5, 1977, the Court of Appeals for the Fourth Circuit, in a panel consisting of Bryan, Senior Circuit Judge, Widener, Circuit Judge, and Kunzig, Judge, United States Court of Claims, sitting by designation, affirmed summary judgment in favor of the Respondents in part, but reversed the summary judgment ruling and remanded with directions that the District Court enter summary judgment for the Petitioners on two issues. 547 F.2d 801. Respondents moved for rehearing, which was denied on February 28, 1977.



On February 11, 1977, mandate issued, but was recalled *sua sponte* on March 21, 1977. Petitioners moved to vacate the order of recall on May 26, 1977, but no explicit ruling on this motion was entered.

Upon rehearing *en banc* before Circuit Judges Haynsworth, Winter, Butzner, Russell, Widener, Hall and Senior Circuit Judge Bryan, an order was entered affirming the decision of the panel subject to certain additions. Judges Winter, Haynsworth and Butzner dissented. 558 F.2d 727.

The Respondents filed a Petition for a Writ of Certiorari, which was granted on July 3, 1978, the judgment of the court *en banc* vacated, and the action remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Regents of the University of California v. Bakke*. 438 U.S. 912.

On July 20, 1978, the Petitioners filed a Motion before the Court of Appeals to expedite the briefing and oral argument upon remand.

On October 20, 1978, Congress enacted Public Law 95-486.

On October 27, 1978, argument before the court *en banc* on remand was scheduled for November 16, 1978, before the same judges who had previously heard the case: Haynsworth, Winter, Butzner, Russell, Widener, Hall and Bryan. Judge Phillips, former Dean of the UNC Law School, recently appointed to fill the vacancy caused by the death of Judge Craven, declined to sit. The decision of the panel and the full court theretofore rendered was reaffirmed. Judges Haynsworth, Winter and Butzner dissented. This opinion was issued on February 2, 1979. 591 F.2d 997. Mandate was not stayed, and no Petition for a Writ of Certiorari was filed.

On May 31, 1979, after the expiration of all deadlines for review, the letter of the court, hereto attached as Appendix A, was sent. Responses were filed by the Respondents on June 4; and June 6, 1979 and by the Petitioners on June 8, 1979. The Petitioners raised the question of the validity of Public Law 95-486 in their response.

On July 27, 1979, Judge Murnaghan was commissioned, and on September 13, 1979, Judge Sprouse was commissioned.

On November 9, 1979, mandate was recalled, the decision of February 2, 1979, was withdrawn, and the matter ordered rescheduled for hearing. This decision was rendered by Judges Winter, with the concurrence of Judges Haynsworth, Butzner, Murnaghan and Sprouse. Judges Russell, Widener and Hall dissented. Judge Phillips took no part in the consideration of the order. Judge Bryan was not mentioned.

## REASONS FOR GRANTING THE WRIT

1. The question of whether Congress has the power to deprive a Senior or Regular Active Judge of the Court of Appeals of the power to sit *en banc* should be settled by this Court.

2. The question whether Congress may deprive a Senior Judge of the Court of Appeals, of the power to sit *en banc* upon cases pending before the *en banc* court on October 20, 1978, should be settled by this Court.

3. The United States Court of Appeals for the Fourth Circuit substantially rejected the doctrine of the finality of decisions, thereby departing from the accepted and usual course of judicial proceedings and necessitating the supervision of this Court.



I.

The Honorable Albert V. Bryan was appointed a Judge of the United States Court of Appeals for the Fourth Circuit on August 15, 1961. At the time of his appointment, a senior judge who sat on a panel was not entitled or authorized to sit *en banc* pursuant to Section 46(c) of Title 28 of the United States Code. *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, (1960). On November 13, 1963, Congress reversed this decision of the Supreme Court, and added the third sentence to Section 46(c) to clarify the status of Senior Judges. Public Law 88-176. 1963 U. S. Code News at 1105.

There is no issue here concerning the jurisdiction of the court. Without question, Congress may increase and decrease the jurisdiction of the federal courts without affecting the tenure of office of the judges of that court. It has done so several times. *E.g.*, Act of March 3, 1875, Section 2 (28 U.S.C. 1331); Act of March 3, 1911, c. 231; Section 24 (28 U.S.C. 1337); Public Law 95-486, Section 9(a) (28 U.S.C. 1337(a)). Nor does this concern the termination of an administrative or non-judicial power of a federal judge, such as the appointment of court officials or the District of Columbia School Board.

On the other hand, it is relatively certain that there would be no disagreement with the proposition that Congress could not, by statute, deprive a particular judge of his right to sit on any particular case or on any particular class of cases. Nor may Congress declare a judge appointed under Article III to be an Article I judge without the protection of Article III. Further, but perhaps less certain, Congress could not deprive certain class of judges of their right to sit. An Act, therefore, to deprive all judges appointed before, *e.g.*, January 20, 1960, or born

before January 1, 1910, of the right to sit *en banc*, would be a violation of Section 1 of Article III of the Constitution. Carpenter, *Judicial Tenure in the United States* (1918), 89-100. See 1 *Moore's Federal Practice* 52, note 18.

To the knowledge of counsel, Congress has not abolished the office of a judge since 1802, Act of April 29, 1802, Act of March 8, 1802, though it has abolished specific courts, *e.g.*, Circuit Courts, Act of March 3, 1911, 36 Stat. 1087, and the Commerce Court, Act of Oct. 22, 1913, 38 Stat. 208, 219, and specific aspects of courts, *e.g.*, Three Judge District Courts, Pub.L. 94-381, Sec. 1, 2, Aug. 12, 1976. Further, to the knowledge of this counsel, Congress has never before deprived an Article III Judge of his right to sit thereafter on an existing court or aspect of a court to which he was appointed. See *Marbury v. Madison*, 1 Cranch (U.S.) 137, 2 L.Ed. 60 (1803); *Stuart v. Laird*, 1 Cranch (U.S. 115, 2 L.Ed. 115 (1803). See also, Frankfurter & Landis, *The Business of the Supreme Court of the United States - A Study in the Federal Judicial System*, 38 Harv. L.Rev. 1005-1059, 39 Harv. L.Rev. 35-81 (1925); 39 Harv. L.Rev. 325-367, 587-627, 1046-1075 (1926); *Carpenter, supra*.

Congress has, in the past, enacted laws making it *permissible* for a judge *voluntarily* to relinquish certain of his powers by retiring from active to senior judge status. 28 U.S.C. 371. It has never before provided for the involuntary termination of any right or power of a federal judge. See 28 U.S.C. 372(b).

At the time of Judge Bryan's retirement, on October 17, 1972, an active judge did not surrender his right to sit *en banc* upon an appeal where he had sat on the original panel by retirement. Judge Bryan, therefore, cannot be



said to have voluntarily relinquished this right, albeit limited and contingent, to sit *en banc*.

This question takes upon itself importance beyond this particular case in the light of proposals before Congress to deprive any judge eligible for retirement (presently at ages 65 and 70, 28 U.S.C. 371(b)) of his or her right to sit *en banc* under any circumstance. Senate Report No. 95-117, page 52. See also Transcript of Hearings on Circuit Realignment, Part II, at pages 54 (Judge Gee), 124, 126, 132 (Chief Judge Chambers) and 168 (President of California Bar Association).

Further, litigants in the future will not pursue appeals grounded on the absence of a judge whose inclinations have not been articulated, or who might be embarrassed or offended by being made the point of contention. Only where the judge has, by mistake, heard the appeal *en banc* and held to his position will litigants prosecute the error of his exclusion from a subsequent *en banc*. This will happen rarely, but it did happen in this instance.

Congress may not constitutionally deprive an Article III Judge of any judicial power or function which other judges of the court to which he was appointed continue to exercise. This ought to be so declared by this Court.

II.

Congress did not intend to deprive a senior judge of the court of appeals of his power to sit *en banc* upon cases pending before the *en banc* court on October 20, 1978. Such an interpretation would conflict with the strong public policy concerning designation and assignment that a designation ordinarily "runs with the case". *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949); *Allan v. Johnson*, 391 F.2d 527, 532 (5th Cir. 1968). See 28 U.S.C.296, third paragraph.

The committee reports and legislative history suggest no such intent. In the only reference to the deletion of the third sentence of Section 46(c), found in any report or debate, the intent expressed was to prevent *en banc* courts from becoming so large as to be unworkable, a problem which would arise in the future and would not touch upon pending cases. Senate Report No. 95-117, page 52.

Indeed, in the debate on Public Law 95-486, Senator Kennedy, speaking as an author of the final version of the bill, expressed the opinion that neither active nor senior judges of a court of appeals could be lawfully deprived of his right to hear appeals from any geographical part of the circuit, 124 *Cong. Record*, 17, 517 (1978). If one of the leaders of Congress questioned their ability to rearrange the geographical aspects of the court, then they could hardly be presumed to have intended to deprive a judge of his right to hear a case then pending before him.

III.

The Court of Appeals substantially transgressed the proprieties of judicial action in recalling the mandate of the court, *sua sponte*, eight months after it issued and six months after the statutory period for review had expired (May 2, 1979). At some point every case must be considered final. *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 523, 525-526 (1931); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973); *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965); 16 Wright, *Federal Practice and Procedure*, 281-282. To withdraw an opinion every time new judges are able to vote who may not have agreed with the original opinion makes a mockery of this concept.



This departure from accepted judicial process was exacerbated because the Recall of Mandate was not made upon a written Motion, as required by Rule 27 of the Federal Rules of Appellate Procedure, 9 *Moore's Federal Practice* 4404, but was done *sua sponte*. Counsel for the Petitioner can send no case in which Mandate was recalled except upon timely written motion. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1943); *Williams v. Conger*, 131 U.S. 390 (1887); *Peck v. Sanderson*, 59 U.S. 42 (1855); *Sibbald v. United States*, 37 U.S. 488 (1838); *Haney v. Chesapeake & Ohio R.R.*, 498 F.2d 987 (D.C. Cir. 1974); *Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672 (9th Cir. 1973); *Powers v. Bethlehem Steel Corp.*, *supra*; *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 275 *et seq.* (D.C. Cir. 1971); *Legate v. Maloney*, *supra*; *Iverson v. Commissioner*, 257 F.2d 408 (8th Cir. 1958). Further, though a hearing was explicitly requested by the Petitioner, none was conducted. 9 *Moore's Federal Practice*, 4404, and n. 2.

Where previously this Court has entertained challenges to sitting judges, the issues have been raised during the normal course of review, not by the extraordinary means of recalling mandate after the time for review had expired. See *Glidden Company v. Zdanok*, 370 U.S. 537 (1962). Here the Respondents filed neither a motion for rehearing nor a petition for certiorari, and the time for filing both had expired.

Another and perhaps crucial element of this impropriety was the fact that the court delayed its consideration of the recall until after the appointment of two new judges, thereby changing the result. The original six judges in regular active service split evenly on the question of recall. Had the subject been considered at the time it was first brought before the court, in mid-June, 1979, or at the time before then,

the decision would have not been recalled. An evenly split court could have taken no action, and the February 2, 1979, decision would have endured. *McDowell v. United States*, 159 U.S. 596 (1895); *Ex Parte Ward*, 173 U.S. 452 (1899); *Cf. Glidden Company v. Zdanok*, *supra*.

If a decision may be withdrawn whenever the personnel of a court changes, then our government is indeed one of men, not laws.

## CONCLUSION

For these reasons, the petitioners suggest that this case presents important questions for review which because of unique circumstances, will probably not hereafter be presented, and that a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit ought to issue in this proceeding.

Respectfully submitted, this _____ day of January, 1980.

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# APPENDIX A

[Court of Appeals Letterhead Omitted]

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Re: 75-2276, Lawrence A. Uzzell, et al vs. William C. Friday, etc., et al

Dear Counsel:

Only recently we were informed that Section 5(a) of the Omnibus Judgeship Bill enacted last fall repealed the third sentence of 28 U.S.C. 46(c). That sentence is the one which authorized senior judges who previously had sat on a panel of the court before which the case was first heard to sit as a member of the *en banc* court. Since that sentence has been repealed, it now appears that Judge Bryan's participation in the case was unauthorized.

The court will welcome suggestions from counsel as to what should be done in the circumstance.

Sincerely yours,

WILLIAM K. SLATE, II

By /s/ Carol R. Lemon
(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL:fls

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## APPENDIX B

---

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2276

Lawrence A. Uzzell, et al.,

Appellants,

v.

William C. Friday, et al.,

Appellees.

---

ORDER

It appearing to the court that, unknown to it and to counsel, when it sat on November 16, 1978, as an in banc court to hear argument of the above-entitled case, and



when on February 2, 1979, it decided said case, it was improperly constituted as an in banc court in the light of the repeal of the last sentence of 28 U.S.C. 46(c) by Pub. L. 95-486, 5(a), it is, with the concurrence of Chief Judge Haynsworth, Judge Butzner, Judge Murnaghan and Judge Sprouse, ORDERED that:

(1) The mandate heretofore issued be and it is hereby recalled.

(2) The opinion of February 2, 1979, be and it is hereby withdrawn.

(3) The case is returned to the hearing calendar for reargument before a properly constituted in banc court.

(4) The clerk shall fix a date for reargument as soon as an in banc court can be convened.

Judge Russell, Judge Widener and Judge Hall dissent from the entry of this order. Judge Phillips took no part in the consideration of this case or of this order.

/s/ Harrison L. Winter
Harrison L. Winter
United States Circuit Judge